

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Rhythms Links Inc. Section 63.71 Application
to Discontinue Domestic Telecommunications
Services
NSD File No. W-P-D-517

ORDER

Adopted: September 24, 2001

Released: September 24, 2001

By the Common Carrier Bureau:

1. In this Order, we grant Rhythms Links Inc.'s (Rhythms Links) Section 63.71 application to discontinue providing its domestic telecommunications services in all geographic areas throughout the United States, pursuant to section 214(a) of the Communications Act of 1934, as amended, and section 63.71 of the Federal Communications Commission's (FCC or Commission) rules. As explained in further detail below, authority to discontinue will be effective after midnight on September 24, 2001.

1 47 U.S.C. § 214(a).

2 47 C.F.R. § 63.71.

3 A number of parties have filed objections to the grant of this application, see, e.g., Objection of Cisco Systems, Inc. (Aug. 24, 2001), and that on September 18, 2001, Cisco Systems, Inc. filed a Petition to Deny Rhythms Links' Emergency Application for Immediate Review. To the extent any of these filings would be deemed Petitions to Deny the present application under 47 C.F.R. §63.52(c), we deny such petitions. Further, as we discuss below, we denied Rhythms Links' Emergency Petition, thus addressing Cisco's Petition to Deny. As a separate matter, we had originally planned to release this order on September 21, but delayed doing so until September 24 to allow Cisco to provide evidence of allegations it made on September 21 that national security interests might be affected by the proposed discontinuance. We received affidavits from Cisco at approximately 12:15 a.m., September 24, which state in pertinent part, "we believe that Cisco engineers principally responsible for maintaining the networks of critical government agencies now have replacement broadband connections," and that Cisco's Chief Technology Officer "do[es] not believe that critical government contracts would be compromised by a discontinuance." Letter from Christopher J. Wright to Jeffrey Carlisle, Common Carrier Bureau, NSD File No. W-P-D-523 at 2 (dated Sept. 23, 2001); Declaration of Gregory N. Akers, NSD File No. W-P-D-523 at 2, ¶ 4 (dated Sept. 23, 2001). The new evidence and allegations appear to go principally to the issue of the adequacy of substitute service. This issue has been in the proceeding from the outset, and should have been fully addressed in the filed comments. The comment period has long since closed, and it would be inappropriate to submit further evidence on this point on the very day that discontinuance authority is scheduled to go into effect. Moreover, it is practically impossible to (continued....)

## BACKGROUND

2. On August 10, 2001, Rhythms Links Inc. (Rhythms) filed an application with the Commission requesting authority under section 214(a) of the Act and section 63.71 of the Commission's rules to discontinue its domestic telecommunications services in all fifty (50) states. The applicant has stated that it is a wholly-owned subsidiary of Rhythms NetConnections Inc. (Rhythms NetConnections), that Rhythms NetConnections provides high-speed broadband services, primarily using Digital Subscriber Line (DSL) technology, and that telecommunications services for Rhythms NetConnections are provided by Rhythms Links. Rhythms Links states that on August 2, 2001, it publicly announced that Rhythms NetConnections had filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code in the Southern District of New York.<sup>4</sup> Rhythms Links states that it has pursued alternative means to develop long-term business solutions, but despite these efforts, it must cease providing service. On August 9, 2001, Rhythms Links sent overnight-delivery notice of the proposed discontinuance to its affected customers, and that on August 10, 2001, it issued a press release notifying the public of its proposed discontinuance.

3. By Public Notice dated August 24, 2001, the Commission notified the public that in accordance with 47 C.F.R. § 63.71(c), the application would be deemed to be automatically granted on the thirty-first (31<sup>st</sup>) day after the release date of this notice, unless the Commission notified Applicants that the grant would not be automatically effective.<sup>5</sup> Accordingly, the automatic grant date for this application would be September 24, 2001. To this date, the Commission has received oppositions to Rhythms Links' application from forty-one (41) customers.

## DISCUSSION

4. Section 214(a) of the Communications Act, as amended, states that “[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby.”<sup>6</sup> The primary purpose of this requirement is to reduce the harm to consumers caused by discontinuances of service, which is an important aspect of the Commission's general obligation under the Communications Act to protect and promote the public interest.<sup>7</sup> As the Commission has stated, “we have retained the right to delay grant of a discontinuance authorization if we believe an unreasonable degree of

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test Cisco's assertions with Rhythms Links or any other party in this proceeding. We therefore disregard the remainder of the evidence provided in reaching the conclusions expressed herein.

<sup>4</sup> See *Rhythms NetConnections, Inc.*, Ch. 11, Case Nos. 01-14283 (BRL) through 01-14287 (BRL) (S.D.N.Y.). Rhythms states that in a press release published nationwide and posted on its website, it outlined its intent to discontinue service in the event that reorganization was not possible.

<sup>5</sup> *Comments Invited On Rhythms Links Inc. Application to Discontinue Domestic Telecommunications Services*, Public Notice, NSD File No. W-P-D-517, DA 01-2009 (rel. Aug. 24, 2001).

<sup>6</sup> 47 U.S.C. § 214(a).

<sup>7</sup> See 47 U.S.C. § 201.

customer hardship would result,”<sup>8</sup> and will review each application to determine whether proper notice has been given, whether customers or other end users are able to receive service or a reasonable substitute from another carrier, and whether the public convenience and necessity is otherwise adversely affected.<sup>9</sup>

5. *Notice.* In 1999, the Commission revised its rules concerning the manner in which the Commission would allow carriers to terminate service to their customers and exit from the market.<sup>10</sup> The Commission explained that “even customers with competitive alternatives need fair notice . . .”<sup>11</sup> Accordingly, carriers must provide their customers notice of the proposed action either before or on the same day of filing a discontinuance application.<sup>12</sup> Nevertheless, the rules continue to provide that the 31-day notice period runs from the release of the Public Notice. Thus, in the event the Public Notice is not issued immediately after the carrier’s application is sent to the Commission, customers may, effectively, receive more than 31 days of actual notice of the carrier’s intention to discontinue service.

6. The application indicates that on August 9, 2001, Rhythms Links sent overnight-delivery notice of the proposed discontinuance to its affected customers, and that on August 10, 2001, it issued a national press release, notifying the public of its proposed discontinuance. The written notice sent by Rhythms Links to its customers contained the requisite information,<sup>13</sup> and was mailed prior to submission of its application to discontinue. Therefore, we find that Rhythms Links gave proper notice to its affected customers in accordance with section 63.71. Moreover, because the Public Notice did not issue until August 24, 2001, Rhythms Links’ customers received considerably more than 31 days actual notice of the proposed discontinuance.

7. *Ability to Receive Service or a Reasonable Substitute and Public Convenience and Necessity.* The Commission has considerable discretion in making a section 214 public interest finding.<sup>14</sup> Generally, we consider, among other things, the public’s reliance upon the service at issue to determine whether discontinuance of a given service will result in an unreasonable degree of consumer hardship. The Commission must also consider, however, the impact on the carrier of requiring service to continue, and whether disallowing the discontinuance, under the

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<sup>8</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Competitive Carrier First Report and Order)*, 85 FCC 2d 1 at ¶ 146 (1980).

<sup>9</sup> See 47 C.F.R. § 63.71(a); see, e.g., *AT&T Application to Discontinue Interstate Sent-Paid Coin Service Not Automatically Granted*, Public Notice, NSD File No. W-P-D-497 (Aug. 3, 2001) (requiring AT&T to show how it will minimize the negative impact on the affected customers).

<sup>10</sup> See *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996 and Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, 14 FCC Rcd 11364 (1999).

<sup>11</sup> *Id.* at 11380.

<sup>12</sup> 47 C.F.R. § 63.71(b).

<sup>13</sup> See 47 C.F.R. § 63.71(a)(5)(i).

<sup>14</sup> *FCC v. RCA Communications, Inc.*, 73 S.Ct 998, 1002 (1953).

circumstances, will present unreasonable exit barriers to an applicant.<sup>15</sup>

8. In looking at the impact on customers, we consider the availability of reasonable substitutes, and whether customers have had a reasonable opportunity to migrate. Rhythms Links states that every customer has multiple alternatives, including the following: T1, fractional T1, Frame Relay, ISDN, 56 kbps DDS, and dial up. In addition, it states that for approximately ninety percent (90%) of the objectors, some form of DSL is available from another service provider. Regardless of these alternatives, however, most of the commenters originally alleged that they would suffer harm because they would not be able to obtain substitute service by September 10, the date Rhythms Links originally planned to discontinue service. However, the standard does not require that every customer be migrated. Rather, it requires that discontinuance not result in an unreasonable degree of consumer hardship. Rhythms Links states that over ninety (90%) of customers who placed orders with alternative providers within five (5) days of receipt of Rhythms Links' notice of discontinuance received installation dates prior to September 10, 2001, and that many customers who waited ten (10) or more days had their orders expedited and will have new service available on or about September 10.<sup>16</sup> Moreover, Rhythms Links has shown that, as of September 6, most of the commenters in this proceeding had either actually received alternative service or had arranged to receive alternative service before September 24.<sup>17</sup> This indicates that most customers have been able to find alternative service.

9. It is significant that while Cisco opposes allowing the discontinuance to go into effect, Cisco has also stated that it has already been able to transition the majority of its employees who use Rhythms Links' service for telecommuting to new providers: out of 8,800 employees, Cisco has been able to transition all but 1,500.<sup>18</sup> Cisco has also stated that some of these employees telecommute full-time, live some distance from Cisco facilities, and do not have office facilities at Cisco.<sup>19</sup> These allegations fail, in our view, to adequately describe the impact on Cisco, much less establish the sort of unreasonable hardship that a customer must show. Cisco has not explained how many employees have an office, and could therefore simply suspend their partial telecommuting for a short period of time, nor how many employees who normally telecommute

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<sup>15</sup> See *Competitive Carrier First Report and Order* at ¶ 147. See also *United States v. Radio Corporation of America*, 358 U.S. 334, 79 S. Ct. 457 (1959) (stating that the promotion of competition is clearly in the public interest).

<sup>16</sup> *Reply of Rhythms Links Inc. to Comments on Application for Authority to Discontinue Domestic Interstate Telecommunications Services*, NSD File No. W-P-D-517 at 2 (Sept. 6, 2001) (*Rhythms Reply*).

<sup>17</sup> *Id.* at Exhibit 3.

<sup>18</sup> *Petition of Cisco Systems, Inc. for Stay of Issuance of Discontinuance Authority*, N-S-D File No. W-P-D-523, Attached Emergency Motion at 4 and Attachment 2 at 12 (Sept. 21, 2001).

<sup>19</sup> *Id.*

full time could arrange to work at alternative office facilities for a short period, if necessary.<sup>20</sup>

10. The Bureau must also consider the fact that the service in question is not basic telephone service, the lack of which would invariably result in an unreasonable degree of customer hardship, but is instead access by end user customers to high-speed data services.<sup>21</sup> For customers that have not been migrated, dial-up service is a reasonable substitute, at least on an interim basis. Cisco alleges that dial-up service is not a reasonable substitute for the employees remaining on Rhythms Links' service, given that these employees must execute graphics-intensive and other programs that require higher bandwidth than dial-up service can provide. Nevertheless, the FCC has never required that every customer be able to obtain fully satisfactory, perfect substitute service, but only a reasonable substitute so that a discontinuance does not result in an unreasonable degree of customer hardship. Thus, Cisco's specific circumstances do not change our conclusion that dial-up access will be a reasonable substitute, at least on an interim basis, for impacted customers.<sup>22</sup>

11. The Bureau has not only considered the type of service, but also the fact that the service provider is a non-dominant provider of competitive data services in financial distress. We are hesitant to require a non-dominant provider of high-speed data services to continue operations to its detriment, particularly in light of the longstanding policy expressed by the Commission over twenty years ago: "[I]n a competitive marketplace, ease of exit is essential. If regulatory exit barriers are not lowered, carriers may be discouraged from entering high risk markets for fear that they may not be able to discontinue service in a reasonably short period of time . . ."<sup>23</sup>

12. In this respect, we have, as we believe we are obligated to do in this situation, considered the interests of the creditors of Rhythms Links in the bankruptcy proceeding pending

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<sup>20</sup> In a meeting with Cisco and its counsel on Thursday, September 20, the Bureau requested clarification as to how many telecommuting employees actually have an office, but Cisco stated that it did not have that specific information available.

<sup>21</sup> This fact alone is enough to distinguish the present application from recent applications involving voice telephone services, the discontinuance of which will invariably result in an unreasonable degree of customer hardship. See, e.g., *Application of Pathnet, Inc. and Pathnet Operating, Inc. to Discontinue Domestic Telecommunications Services Not Automatically Granted (Pathnet)*, NSD File No. W-P-D-503 (Aug. 3, 2001) (wholesale transport services for voice and data networks); *Time Warner Telecom Inc. Discontinuance of Service (Time Warner)*, NSD File No. W-P-D-493 (Jun. 18, 2001) (end user voice services).

<sup>22</sup> For this reason, we also reject the objections of other customers, such as Netisun and Netsolutions Inc. (filed Aug. 28, 2001) and DirecTV Broadband, Inc. (filed Sept 7, 2001), who have alleged that substantial numbers of their end user customers (in DirecTV's case, up to 17,000) will be left without service if Rhythms discontinues service on September 23. Both of these commenters have already commenced migrating their end users to new service platforms, and interim dial-up service for the remaining end users is a reasonable substitute that will not work an unreasonable degree of customer hardship, especially considering the burden on Rhythms Links of continuing service. In any event, as we discuss below, it is possible that service will continue for some period of time past September 24 if a bid for Rhythms Links' assets is approved and consummated.

<sup>23</sup> *Competitive Carrier First Report and Order* at ¶ 147.

in New York.<sup>24</sup> Rhythms Links earlier filed an emergency application requesting authority to terminate service by September 10, 2001, and relied in that application on an alleged financial burden creditors would be forced to shoulder in order to maintain services after September 10.<sup>25</sup> Rhythms Links represented that it has been operating at a daily loss of approximately \$525,000.<sup>26</sup> Rhythms Links also pointed out that customers had received notice of its intent to discontinue service for more than 31 days preceding September 10.<sup>27</sup> We nonetheless determined in our order denying the emergency petition that service must continue because we had not had the opportunity to evaluate the objections that had been filed.<sup>28</sup> Now, however, we have had time to complete our review and, as explained above, are satisfied that Rhythms Links' customers will not, on the whole, suffer an unreasonable degree of hardship. Moreover, the financial burden that the creditors would have to shoulder in order to continue service weighs in favor of granting Rhythms Links' application.<sup>29</sup> Given the extended period customers have already had to transition service, it would be unfair to require the creditors to continue to fund operations past the September 24 date.

13. In summary, we find that Rhythm Links gave proper notice to its customers, which resulted in most affected customers being migrated to other carriers without a service interruption. We also find that reasonable substitute service is available to Rhythm Links' remaining customers, that Rhythms Links' customers will not suffer unreasonable hardship as a result of the discontinuance, and that the public convenience and necessity will not otherwise be adversely affected by Rhythm Links' proposed discontinuance. We therefore grant the application for discontinuance, effective at midnight, September 24, 2001. This means that Rhythms Links may exercise its authority to discontinue each of its customers at 12:01 a.m., September 25, 2001.

14. The Bureau notes that Rhythms Links has made the Commission aware that

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<sup>24</sup> See *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

<sup>25</sup> *Section 63.63 Application of Rhythms Links Inc., Holder of Section 214 Authority*, NSD File No. W-P-D-523 at 5-6 (Aug. 31, 2001) (*Emergency Application*).

<sup>26</sup> *Id.* at 5. At the time Rhythms made its decision to file for reorganization under Chapter 11, it had estimated that it was "sustaining a net cash burn of between \$765,000 and \$895,000." *Rhythms Reply* at 6-7. This particularized showing of financial hardship and inability to continue service further distinguishes the present application from the abovementioned *Time Warner* and *Pathnet* applications. In each case, the service provider represented it was able to continue service for certain customers for the period of time necessary to transfer their customers to new providers, and did not object to such continuance on the grounds of specific financial hardship. *Pathnet* at 2-3; *Time Warner* at 2.

<sup>27</sup> *Id.* at 1-2.

<sup>28</sup> *Rhythms Links Inc. Emergency Application to Discontinue Domestic Telecommunications Services*, Order, NSD File No. W-P-D-523 (Sept. 7, 2001).

<sup>29</sup> We believe that this is true even if there were some way Rhythms could reduce its costs in such a way as to provide service to only some of its existing lines.

WorldCom has made a favorable bid for a substantial portion of Rhythms Links' assets.<sup>30</sup> Furthermore, Rhythms Links has agreed, on the condition that the asset purchase by WorldCom be approved by the bankruptcy court and that WorldCom continues to fund the operations of Rhythms NetConnections and its subsidiaries pursuant to the terms set forth in WorldCom's bid, to continue to provide xDSL service to its existing customers in good standing until the sooner of (a) the occurrence of a termination event, as defined in the WorldCom bid; (b) the closing date, as defined in the WorldCom asset purchase agreement; or (c) the customer in question falling from good standing with Rhythms Links.<sup>31</sup> It appears, therefore, that to the extent that the proposed sale remains viable, affected customers that have not transitioned to another carrier by September 24<sup>th</sup> will continue to receive service from Rhythms Links for some time after that date, provided that the bankruptcy court approves WorldCom's bid. However, while the Bureau notes this commitment with favor, we recognize that there is still some chance that the transaction will not be approved, and that service to some affected customers will be discontinued over their objection. Therefore, we have not relied on this commitment in reaching the result expressed in this order.

### ORDERING CLAUSE

15. Accordingly, pursuant to sections 1, 4(1), and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(1), 214, and sections 0.91, 0.291, and 63.71 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 63.71, IT IS ORDERED that the application of Rhythms Links to discontinue domestic telecommunications IS GRANTED, effective September 24, 2001.

### FEDERAL COMMUNICATIONS COMMISSION

Dorothy T. Attwood  
Bureau Chief  
Common Carrier Bureau

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<sup>30</sup> Letter from Frank V. Paganelli, Vice President of Rhythms Links, to Magalie Roman Salas, Secretary of the Federal Communications Commission (September 20, 2001).

<sup>31</sup> *Id.* "Good standing" is defined to mean any existing Rhythms customer that, within five (5) business days of receiving written notice from Rhythms, shall become current on all obligations owed to Rhythms, including past and current accounts receivable.